United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7471

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY,

Plaintiff-Appellant,

—against—

OVERSEAS OIL CARRIERS, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Issue

Are expenses for medical care and repatriation of an American seaman, incurred at his employer's request, recoverable from the employer?

Statement

After trial on stipulated facts (2a, 10a) of this action for reimbursement of plaintiff-appellant's expenses, incurred at defendant-appellee's request, for medical care and repatriation of a crew member of defendant's ship, judgment (29a) was entered on an unreported opinion by Judge

Goettel (20a) allowing plaintiff's claim for hospital accommodations and nursing expenses and de ing plaintiff's claim for additional fuel expended by diversion and increased speed.

Responding to radio request by the Master of defendant's S/T Overseas Progress, a maximum 13.8 knot Baltimore-bound American flag tanker with no medical staff or facilities, plaintiff's maximum 25 knot New York-bound British flag passenger vessel S/S Canberra with fully staffed and equipped hospital diverted to rendezvous with Overseas Progress on the high seas about 700 miles distant from the nearest shore hospital at St. John's, Newfoundland to provide emergency medical care to Overseas Progress crew member Turpin who had suffered a heart attack and, after taking Turpin aboard, Canberra proceeded at maximum speed to New York for Public Health Service hospitalization of Turpin who, en route, received life-saving medical treatment. Defendant promptly paid plaintiff's bill for $132 doctor's services and $116 medicines but illogically declined to reimburse plaintiff $500 for hospital accommodations and nurses' services and $11,608.95 for 401 tons additional fuel consumed by Canberra to divert 232 miles for Turpin and increase speed to New York from 23 to 25 knots. Plaintiff sued defendant for the sum of those $12,108.95 expenses on alternative claims of *quantum meruit/valebant* and unjust enrichment (Complaint pars. 41, 42, 47-49, 53-55), and the parties stipulated to try liability on the foregoing and other agreed peripheral facts (2a, 10a).

Although noting that Canberra's efforts saved defendant considerable expense (23a) in satisfying defendant's obli-

gation to provide medical care for Turpin (22a), Judge Goettel held that failure of U.S. law to permit an award for life salvage unaccompanied by property salvage (22a-23a)[1] also precludes recovery of pure life salvage expenses (23a); that there was no implied in fact promise by defendant to pay *quantum meruit/valebant* (26a); and since Turpin's need for medical care was not due to any fault or misconduct by defendant, plaintiff could not obtain restitution of its expenses on an implied in law, quasi-contract, unjust enrichment claim (26a-27a), but since Canberra saved defendant the cost of 2 days intensive hospital and nurses' care en route to New York, which "costs accrued after the transfer ('rescue') were effected and were part of custodial treatment and care" (27a), defendant is liable to reimburse plaintiff's reasonable $500 charge for those expenses even though not caused by defendant's fault or misconduct, but is not liable for plaintiff's $11,608.95 additional fuel expense (28a) even though most of that accrued after Turpin was transferred to Canberra.

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[1] The Judge correctly held that the 46 U.S.C. 728 penalty for failure to rescue at sea (20a) does not subject the master of a British vessel on the high seas to criminal sanctions (27a). Under British law, if Canberra had performed pure life salvage in British waters, plaintiff could recover its expenses and a reasonable award. Jarett, The Life Salvor Problem in Admiralty, 63 Yale L.J. 779, 782-783 (1954). Plaintiff does not seek any award (*i.e.*, reward); plaintiff just wants reimbursement of its expenses.

ARGUMENT

I.

Restitution for unjust enrichment does not always require proof of tortious enrichment.

Relying on *Shooters Island Shipyard Co.* v. *Standard Shipbuilding Corp.*, 293 Fed. 706 (3 Cir. 1923), and *F.E. Grauwiller Transp. Co.* v. *King*, 131 F. Supp. 630 (E.D.N.Y. 1955), aff'd 229 F. 2d 153 (2 Cir. 1956), Judge Goettel mistakenly held that plaintiff's unjust enrichment claim is defective because Canberra's additional fuel consumption did not result from any misconduct or fault by defendant (26a).

The issue in *Shooters Island* was whether a second mortgagee with knowledge of a first mortgage on after acquired property had a preferred equitable lien on property bought after the first mortgage with money loaned by the second mortgagee. Holding that "where the evidence shows nothing, expressly or impliedly, was demanded or promised by either party, an equitable lien is not raised by the mere loaning and application of money for purchases and improvements that were understood and intended", 293 Fed., p. 714, the Court rejected the second mortgagee's argument that its loan had unjustly enriched the first mortgagee by increasing the latter's security, on the ground that the equitable doctrine of unjust enrichment "is controlled by an element of injustice entering into the transaction which, in turn, involves an element of misconduct or fault, or undue advantage taken by one party of another. We find nothing of the kind here", 293 Fed., pp. 713-714. In *Grau-*

willer, a scow owner sued to repossess its scow which had been taken and repaired by a Mr. Elliott. After finding "that Elliott had neither rightful title or possession of the scow", the District Court held that inasmuch as "Elliott had no lawful claim to the possession of the scow, having taken possession of it tortiously and without the consent of the owner, he had no authority to procure the furnishing of repairs thereto and obligate the owner therefor", and rejected Elliott's reliance on *Shooters Island* because there was no evidence of any misconduct, fault, or undue advantage by the scow owner, 131 F. Supp., pp. 633-634. The Court of Appeals affirmed on the facts found below which, it said, "leave Elliott as only a persistent interloper, acting at his peril after repeated warnings", 229 F. 2d, p. 153.

Neither *Shooters Island* nor *Grauwiller* is in point. Plaintiff does not assert an equitable claim against a known prior legal right, nor is plaintiff a meddlesome convertor of another's property seeking to recoup officiously made expenses. *Cf.,* Restatement of Restitution §§ 2, 3, 117(1), 128 (1937). Plaintiff, at defendant's request, incurred expenses in performing a duty owed by defendant to Turpin, and defendant is obligated to make restitution for those expenses. *Cf.,* Restatement of Restitution §§ 113, 114.

> "It is not necessary, in order to create an obligation to make restitution or to compensate, that the party unjustly enriched should have been guilty of any tortious or fraudulent act. The question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled?" *Franks* v. *Lockwood,* 146 Conn. 273, 150 A. 2d 215, 218 (Sup. Ct. Conn., 1959); *Bill* v. *Gattavara,* 34 Wn. 2d 645, 648, 209 P. 2d 457 (Sup. Ct. Wash. 1949).

In *Berri* v. *City of New York,* 16 N.Y.S. 2d 86 (City Ct., N.Y. Co. 1939), aff'd 16 N.Y.S. 2d 1015 (App. Term, 1st Dept. 1939), aff'd 259 App. Div. 453, 19 N.Y.S. 2d 347 (App. Div., 1st Dept. 1940), granting refund of prepaid real property taxes where the City took title to the property by condemnation before the half-year for which the tax had been prepaid, the lower Court held, 16 N.Y.S. 2d, p. 89, that " 'unjust enrichment' is not necessarily 'unlawful enrichment' and * * * restitution does not presuppose a wrong by the person who has received the property", citing the Introductory Note to Chapter 7, Restatement of Restitution, p. 522. In *Duffy* v. *Scott,* 235 Wisc. 142, 292 N.W. 273 (Sup. Ct. Wisc. 1940), defendant's agent borrowed from plaintiff to balance the agent's account with defendant and deposited the money to defendant's credit without defendant's knowledge that the deposit had been borrowed from plaintiff. In allowing plaintiff restitution on the equitable principle of unjust enrichment, the Court held, 292 N.W., p. 276: "To make the doctrine of restitution applicable it is not necessary that the recipient be guilty of tortious conduct or at fault himself", citing Restatement of Restitution § 15, Illustration 8, p. 67: "A, the local agent of P, authorized to receive payment of accounts receivable but not to borrow money, borrows from T $1,000 on P's account and deposits it to P's credit in the bank in which P has an account. Not knowing the source of the money, P withdraws it from the bank. T is entitled to restitution from P", and Restatement of Restitution § 155, Comment a, p. 612: "The rule stated in this Section applies where there was no tortious conduct on the part of the recipient and where he was not substantially more at fault than the claimant for the transaction resulting in the claimant's right

to restitution. It applies where neither party was at fault, where the claimant was at fault and the recipient was not and to cases where both were at fault in nearly equal degree." In *Chase* v. *Corcoran,* 106 Mass. 286 (Sup. Ct. Mass. 1871), plaintiff found a drifting boat in danger of sinking and, not knowing that defendant owned the boat, secured and repaired it. After defendant repossessed the boat, plaintiff sought to recover the repair expenses, which the Court distinguished from a salvage claim, and which it allowed because of defendant's quasi-contractual liability to reimburse although there was no wrongdoing by defendant. *Cf.,* Restatement of Restitution § 117(1).

Maritime awards for property salvage and general average are quasi-contractual, akin to the law of restitution, *United States* v. *Cornell Steamboat Co.,* 202 U.S. 184, 193-194 (1906); *Archawski* v. *Hanioti,* 350 U.S. 532, 535 (1956), and it is "hornbook doctrine that equitable principles are part and parcel of the law administered in admiralty", *Demsey & Associates, Inc.,* v. *S.S. Sea Star,* 500 F. 2d 409, 411 (2 Cir. 1974). As noted in *Archawski*[2], *supra,* 350 U.S., p. 536: "Rights which admiralty recognizes as serving the ends of justice are often indistinguishable from ordinary

[2] The admiralty jurisdiction question in *Archawski* is not an issue in this case because, as alleged (Complaint pars. 1-3, 5, 7-8) and stipulated (2a), plaintiff is an English company with its principal place of business in London and defendant is a New York corporation with its principal place of business in New York, and thus there is 28 U.S.C. 1332(a)(2) diversity jurisdiction. *Cf.,* Judge Clark's discussion of quasi-contract admiralty jurisdiction in *Sword Line* v. *United States,* 230 F.2d 75, 76-78 (2 Cir. 1956) aff'd *per curiam* 351 U.S. 976 (1956) on authority of *Archawski.* Admiralty courts can apply the equitable rule of Restatement of Restitution § 115 to reimburse one who performs the duty of another without the latter's knowledge or consent or, *ipso facto,* fault. *Seaboard Shipping Corp.* v. *Jocharanne Tugboat Corp.,* 461 F.2d 500, 505 (2 Cir. 1972).

quasi-contractual rights created to prevent unjust enrichment."

The Restatement of Restitution contains many illustrations of the right to recover for unjust enrichment without fault or misconduct by the party liable. *E.g.*, Illustrations 3, pp. 45-46; 1, p. 64; 3, pp. 64-65; 4-6, p. 65; 11-13, p. 68; 1, p. 72; 2-4, p. 83; 1-2, 4, pp. 88-89; 1-3, 5, p. 93; 1-3, p. 95; 2, pp. 98-99; 3-5, p. 119; 6-8, p. 120; 1-6, pp. 148-149; 10, p. 161; 1-3, 4, 6-7, pp. 199-200; 1, p. 477; 1, p. 484. As stated in the Comment to § 155, p. 615: "In two types of situations a person may be required to pay for services which he has not requested [here, defendant requested plaintiff's assistance] and for the receipt of which he is not at fault. First, if because of an innocent mistake, improvements have been made upon his land by another and he seeks the aid of equity against the improver, he must pay for the increased market value of the land due to the improvements (see § 42). Secondly, restitution may be granted to one for services which constitute the performance of another's duty or which are rendered in an emergency in the protection of another's life or property (see §§ 43, 54, 113-117)."

II.

Alternatively, plaintiff is entitled to reimbursement under maintenance and cure law.

Although U.S. law does not permit a reward for life salvage unaccompanied by more/less simultaneous property salvage, there appears to be no decision (other than Judge Goettel's) denying reimbursement of a pure life salvor's expenses in a suit against a U.S. shipowner which requested

the salvor to fulfill the shipowner's maintenance and cure obligations to its seaman employee.[3]

> "There can be little question that where a seaman sick or injured in the service of the vessel without willful misbehavior on his part, has been placed in a hospital or in the care of a physician by the master or owner • • •, the owner can be held liable for the debt incurred. [Footnote citations omitted]" 2 Norris, *supra,* 575, p. 95.

Thus, if Turpin had paid plaintiff's bill for hospital accommodations and nurses' services, Turpin would have been entitled to reimbursement from defendant.[4]

> "When a seaman is seriously injured aboard a vessel, and there is no surgeon on the ship, it is the duty of the master in the sound exercise of his reasonable judgment • • • to have him taken speedily to a hospital or to stop at the nearest port where hospital or surgical care can be procured. [Footnote citations omitted]" 2 Norris, *supra,* § 584, p. 116.

Thus, if Overseas Progress had not been able to rendezvous with Canberra or another medically staffed and equipped vessel, the Master of Overseas Progress would have been

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[3] The extent of the shipowner's duty/liability for failure to provide shipboard/shoreside medical care to ill/injured crew members, including deviation/repatriation costs, is set forth in 2 Norris, The Law of Seamen (3d ed. 1970) §§ 543, 572, 575, 578, 583, 584, 589, pp. 14-15, 90-91, 95, 102-103, 114, 116-119, 129; Gilmore & Black, The Law of Admiralty (2d ed. 1975), § 6-13, pp. 310-312.

[4] If defendant had callously refused to reimburse Turpin, he could have recovered his attorney's fees from defendant. *Vaughan* v. *Atkinson,* 369 U.S. 527 (1962).

bound to divert from Baltimore and proceed full speed to the nearest shore hospital at St. John's.[5]

> "Although the general maritime law makes no provision for transportation or repatriation of sick or disabled seamen, it is an established principle of American maritime law that seamen injured in the service of their ship are entitled * * * to be transported home at the expense of the ship. [Footnote citations omitted]" 1 Norris, *supra,* § 418, p. 496.
>
> "If the seaman is forced [for medical reasons] to leave the ship in a foreign port, he must be provided with transportation back to the United States. [Footnote citations omitted]" Gilmore & Black, *supra,* § 6-13, pp. 310-311.

Thus, if instead of getting Canberra to repatriate Turpin to the United States by sea, Overseas Progress had gotten him alive to the hospital at St. John's, defendant would have been required to pay Turpin's transportation to the United States from St. John's.[6]

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[5] Estimated diversion costs of a 16.5 knot, 80,000 ton tanker are $45 a mile, $849 an hour, $20,370 a day, of which about 40% is for fuel. "Feasibility Study For The Development And Use Of The Satellite Communications System To Provide Shipboard Emergency Medical Service", National Maritime Research Center, Maritime Administration, United States Department of Commerce (1976), pp. 18-20. Overseas Progress, a 13.8 knot, 13,030 ton tanker (2a), was 740 miles, 57 hours away from St. John's before the rendezvous maneuver (17a), and her estimated fuel diversion cost to St. John's would have been at least $6,500, plus the cost of getting back on course to Baltimore.

[6] If *Hopson* v. *Texaco,* 383 U.S. 262 (1966), has implicitly overruled *McCall* v. *Overseas Tankship Corp.,* 222 F. 2d 441 (2 Cir. 1955), plaintiff was defendant's repatriation agent for whose negligence defendant would have been liable to Turpin, and if Canberra's doctor had negligently injured Turpin, defendant would have been liable to Turpin for damages. *Fitzgerald* v. *A. L. Burbank & Co.,* 451 F. 2d 670 (2 Cir. 1971).

Conclusion

The judgment below should be modified to allow recovery of plaintiff's additional fuel expense.

November 8, 1976

Respectfully submitted,

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